

40 Writing Hacks for Appellate Attorneys

Brian C. Potts

I am a career law clerk for a federal appellate judge. Like any member of the court system, I keep an open mind until each case closes. But also like any member of the court system, I often know within the first pages of a brief whether it rides on the right track. Here are 40 suggestions to avoid derailing.

1. Give us an early, simple, compelling sentence explaining why you should win.
2. Be clear and consistent about the relief you seek.
3. Sound a theme across the pages.
4. Write readable, sensible, concise, and punchy issue statements. Gibberish doesn't help. Inverted cryptography doesn't help. Please don't torture us.
5. Don't parrot your opponent's presentation of issues. Frame issues fairly but also favorably to your side.
6. If an issue below no longer matters on appeal, say so clearly if there is any chance of confusion. Delineate the current issues.
7. Even in the table of contents, don't use all caps or even all initial caps in heading sentences.
8. Use organized headings as signposts to guide us to your conclusion. Don't throw headings away. Make them meaningful.
9. Large font is great. The big dogs with the hefty cases use big font. They know that their cases are important. They know

how to win. You are a big dog. Your case is important. You know how to win. Use large, clear font. Even footnotes should have readable font. This article's font is probably smaller than the font you should use. Consider your audience's eyes. See Fed. R. App. P. 32(a)(5); remember, it sets minimum but not maximum standards for font size.

10. Even though it's a serious and important appeal, you should tell us a story. Precisely because it's a serious and important appeal, you should tell us a story.
11. Be enthusiastic and engaging in briefs and at oral arguments (unless inappropriate given your case).
12. Show why ruling your way matters broadly. Why is justice on your side? Why would ruling for the opposition set bad precedent?
13. Make us smart. Make it easy for us to understand the law and your case. Make it easy for us to see the case your way. Teach. Compel.
14. Consider embedding clips of important language, graphs, maps, and other images directly into your brief. If a document wins the case for you, why not show us the actual dispositive language early in the brief? Don't make us dig for it. Embedding images of key text — like a clip of a contract as it actually looks — helps us. It unveils the source. It makes the language striking and memorable. It highlights the text's importance. It lends you credibility and an appearance of record mastery. Ensure that the image is crisp, clear, and large. *See* Fed. R. App. P. 32(a)(1)(C).
15. State all applicable standards of review. *See* Fed. R. App. P. 28(a)(8)(B). Defend them if necessary. They might be the ball game.

16. Avoid discussing irrelevant, tangential facts, except for context in a compelling story.
17. Directly address your opponent's main arguments in detail.
18. Expressly concede issues if appropriate.
19. Admit weaknesses if appropriate. This gives you credibility. But generally show confidence in your positions. If you're not confident in them, why should we be?
20. Be careful when using phrases like "as Plaintiff argued below" or "as stated below" because *below* could mean "in the lower court" or "later in this brief."
21. Don't launch from quarreling below into quarreling above. Don't assume that we followed the prior sparring. We didn't.
22. Don't personally criticize the district judge or opposing counsel (unless necessary somehow).
23. Don't misrepresent cases. Don't say that a holding depended on X when the holding depended on Y and the court merely added as alternative dictum that X might also support the holding. If you misrepresent a case, we will catch you. Your argument will look weak, and you will look bad. Represent cases fairly and accurately. Spin and argue cases, sure, but don't say that a case says something it doesn't. Don't unfairly overstate or understate a case.
24. Ensure that your quotations are exact. Ensure that every letter in quotation marks is in the original, unless you specifically indicate otherwise. Don't drop a word without an ellipsis, and don't add or change a word without brackets. Don't be sloppy. Double-check. A misquote can undermine your credibility and change the passage's meaning. Of course, you would never intentionally misquote a case or the record. You are ethical. But don't give us any reason to wonder.

25. Don't say things like "That is hardly a persuasive argument" or "That can hardly be called a voluntary confession." Just say, "That is not a persuasive argument" and "That was not a voluntary confession." *Hardly* and *barely* in this context imply that the opposition might be right. Besides, these words obstruct. Don't say, "It makes little sense to hold." Just say, "It makes no sense to hold." Unless you think the other side makes *some* sense.
26. Don't overitalicize. Don't write: "Alpha filed the *Motion*, and the court *dismissed* Alpha's claim *with prejudice*, but *not* with *costs*."
27. Don't overuse block quotations. When you must use one, introduce it with a summary and explain its importance.
28. Be consistent with terms. For example, don't use different abbreviations for a name. *See* Fed. R. App. P. 28(d). Don't say "consumer debt" and then suddenly switch to "personal debt" if you mean the same thing.
29. Avoid jargon.
30. *But* is key. Use it often. Use it to begin sentences. It sharpens ideas. It dramatically turns. Rambling is bad. But a simple *but* punches the point. Shakespeare used *but* 164 times in 154 sonnets. I expected many because his sonnets famously turn. But I didn't expect so many. That's an average of over one *but* per sonnet, like Pelé and Messi averaging over one goal per match for some of their best stretches.
31. Don't insult our intelligence and kill your flow with needless parentheticals:

Foreman John Smith (hereinafter referred to as "Smith") arrived.

Why give us that horrible *hereinafter*? Why tell us that you'll refer to Smith as *Smith*?

32. Never write: "In summation." What a nasty, interminable phrase for something supposed to be short and sweet.
33. Think about replacing:
- *with regards to* with *regarding* or *about*
 - *prior to* with *before*
 - *in order to* with *to*
 - *pursuant to* with *under*.

34. Direct voice shines. Guides emphasize it. But I still see writing like this:

Simmons was ordered by Farling to alter his reports so as to lie about his findings on a particular case regarding an event in which an inmate was shot by a security guard.

The writer strains to squash interest.

35. Avoid speed bumps. I saw a sentence like this:

To be absolutely and abundantly precise, the Appellants vehemently and vigorously urge this Honorable Court to not accept as sufficient the Appellees' mere contention — expressed in their Memorandum in Support of Motion to Dismiss Second Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief Due to Lack of Subject Matter Jurisdiction Due to Mootness and Failure to State a Claim (hereinafter, "Appellees' Brief") — that . . .

You must find a better way.

36. Cite the record as clearly and consistently as possible. See Fed. R. App. P. 28(e). Be explicit in an appendix's table of contents. Your documents bear many numbers when they reach us. So guide us. One excellent table I saw pointed us directly to the appendix page numbers like this:

Appendix Table of Contents

Begins on
(Appendix page
numbers are in
the upper right-
hand corner)

1. District court's order granting summary judgment	1
2. Affidavit of Adam Smith	22
3. Contract	25

Give us a clear map to the treasure in the record. Think *Treasure Island*, with an X marking the spot. Leave hidden rune letters to dwarves.

37. Include a compelling conclusion. Don't throw this section away as boilerplate.
38. Always edit. And then edit again. Ensure that each word carries its weight, or cut it.
39. Ensure that our physical copies of your brief have good, clear, sharp printing. You'd be surprised how often a brief appears faded, as if printed with low ink. Not your problem? Sorry, but it is your problem. *See* Fed. R. App. P. 32(a)(1).
40. Follow binding rules, including local rules. Also follow *binding* rules. Some briefs unravel in my hands. *See* Fed. R. App. P. 32(a)(3) ("The brief must be bound in any manner that is secure . . .").